

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1339

B
MS

To be argued by
THOMAS P. SMITH

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1339

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES PURCELL OLIVER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

PETER C. DORSEY

United States Attorney

District of Connecticut

141 Church Street

New Haven, Connecticut 06510

THOMAS P. SMITH

Assistant United States Attorney

for the District of Connecticut

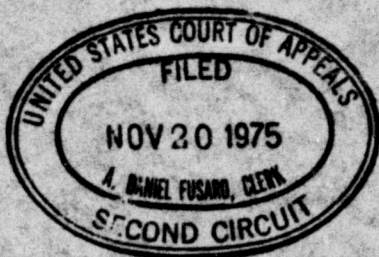




TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Questions Presented	2
Statutes Involved	2
The Facts	3
ARGUMENT:	
I. The miscitation of a statute in Counts Two and Three of the Indictment was a totally innocuous typographical error, which in no way prejudiced the defendant, and which, under the circumstances of this case, does not warrant reversal of his conviction on those counts	6
II. There was ample evidence to sustain James Oliver's conviction on each count of the Indictment	7
CONCLUSION	8

TABLE OF CASES

<i>United States v. D'Allesandro</i> , 517 F.2d 432 (2d Cir. 1975)	7
<i>United States v. Glasser</i> , 315 U.S. 60, 80 (1942) ...	7
<i>United States v. Johnson</i> , 513 F.2d 819, 821, (2d Cir. 1975)	7
<i>United States v. Koss</i> , 506 F.2d 1103, 1106 (2d Cir. 1974)	7

<i>United States v. Rivera</i> , 513 F.2d 519, 533 n. 21 (2d Cir. 1975) (Friendly, J.)	7
<i>United States v. Zolli</i> , 51 F.R.J. 522, 526 (E.D.N.Y. 1970)	7

STATUTES

Title 18, United States Code, Section 844	3
Title 26, United States Code, Section 5845	2
Title 26, United States Code, Section 5861	2
Rule 7, Federal Rules of Criminal Procedure	3

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-1339

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES PURCELL OLIVER,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

A Grand Jury at Hartford returned a three-count indictment on November 15, 1974, charging James Purcell Oliver with the unlawful possession of an unregistered molotov cocktail in violation of Title 26, United States Code, Section 5861(d), and the unlawful use of a telephone to convey threats to kill or injure persons, and to destroy a building, by means of an explosive in violation of Title 18, United States Code, Section 844(e).

Represented by the Federal Public Defender, defendant Oliver entered a not guilty plea to all counts on December 9, 1974. Approximately three weeks later the government filed its notice of readiness, and the matter was scheduled for trial.

Trial was held before the Honorable T. Emmet Clarie, *Chief Judge*, and a jury on June 19th and 20th, 1975.

After approximately three hours' deliberation a verdict of guilty on all counts was returned. Bond was set by the Court at Ten Thousand Dollars (\$10,000) full surety.

On September 15, 1975, James Purcell Oliver was sentenced to five years imprisonment on each count, *to run concurrently*.

Notice of appeal was filed on September 17, 1975.

Questions Presented

Does the inadvertent miscitation of a statute in Counts Two and Three of the Indictment warrant a reversal of defendant's conviction on those two counts?

Was the evidence sufficient to sustain defendant's conviction on each of the three counts of the indictment?

Statutes Involved

Title 28, United States Code, Section 5861:

§ 5861. Prohibited acts

It shall be unlawful for any person—

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record;

Title 26, United States Code, Section 5845:

§ 5845. Definitions ..

For the purpose of this chapter—

(a) Firearm—The term "firearm" means . . .

(8) a destructive device.

Title 18, United States Code, Section 844:

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of an explosive shall be imprisoned for not more than five years or fined not more than \$5,000, or both.

Rule 7, Federal Rules of Criminal Procedure
(Title 18, United States Code)

(c) Nature and Contents

* * * * *

(3) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

The Facts

At approximately 8:30 on the evening of July 14, 1974, James Purcell Oliver visited the home of Lillie Mae Jenkins, his former girlfriend, to demand the return of a television set he had previously given to her as a gift (Tr. 9-11).^{*} Miss Jenkins, referred to as "Cookie" by her relatives and acquaintances, resided with her mother and siblings in a second floor apartment located in a multi-family dwelling at 20 Capen Street in Hartford (Tr. 6, 18, 49-50). After a brief argument, Miss Jenkins returned the television set to James Oliver, who immedi-

^{*} References marked "Tr." refer to the transcript of the trial in the District Court on June 19th and 20th, 1975.

ately smashed it upon the ground directly in front of 20 Capen Street (Tr. 11). At this time James Oliver was clearly overheard to yell, swear, and declare that he was "going to get" Miss Jenkins (Tr. 11, 53). He then left the vicinity of Miss Jenkins' home, walking "up the street, hollering and screaming." (Tr. 12).

Oliver's next return to the vicinity of 20 Capen Street occurred less than two hours later. At approximately 10:00 that evening, while Miss Jenkins and her mother were sitting on their porch overlooking the street, James Oliver again walked past the apartment, this time "with two bottles in his hand, and said he was going to burn the house down." (Tr. 12, 52). Miss Jenkins, who had both dated and lived with James Purcell Oliver for nearly three years prior to July 14th was able positively to identify him as the individual carrying these bottles and threatening to destroy her home (Tr. 9, 13, 27).

At approximately 1:50 on the morning of July 15, 1974, Lillie Mae Jenkins was startled from a sound sleep by the crash of breaking glass and the odor of gasoline filtering through her bedroom window (Tr. 13-14). She immediately jumped from her bed and went to the window, from which she was able to "see a reflection of James running down the street." (Tr. 14).

In order to get a better view of Oliver, Miss Jenkins and her mother, Katherine Marshall, who was also awakened by the noise, ran to the kitchen and looked out a window facing the direction toward which Lillie Jenkins had moments earlier seen James Oliver running (Tr. 14-15, 56). The view from that window was unobstructed (Tr. 16, 56). Both Lillie Jenkins and her mother clearly saw James Oliver running from 20 Capen Street into a brightly-lighted outdoor basketball court which, save for Oliver alone, was totally unoccupied (Tr. 16-17, 55-57). At this point Miss Jenkins called the police (Tr. 14).

Officer Axuncion T. McQueeney arrived on the scene moments later (Tr. 78). During the course of Ms. McQueeney's interview of Lillie Jenkins and Mrs. Marshall, the telephone rang (Tr. 18). The apartment occupied by Miss Jenkins and her family is equipped with three telephones (Tr. 18). While Miss Jenkins listened on one phone, and Mrs. Marshall listened on another, Officer McQueeney listened on the third telephone (Tr. 18, 57, 86-87). All three women heard a male voice make, in substance, the following threat, "I missed this time, but I won't the next time." (Tr. 18-19, 57, 86-87). Miss Jenkins and her mother both positively identified as James Purcell Oliver (Tr. 17, 51, 57). So too did Miss Jenkins' brother, Stephan F. Marshall, who had spoken to Oliver over the phone on previous occasions and who received other threatening phone calls from him on that evening (Tr. 71-73).

Before leaving 20 Capen Street, Officer McQueeney gathered from beneath Miss Jenkins' bedroom window glass fragments from a shattered beer bottle, which had been stuffed with gasoline-saturated cotton wadding. (Tr. 78-83, 121-125). These objects were immediately recognized to be the remnants of a molotov cocktail which, fortunately, failed to ignite (Tr. 79). ATF Agent Robert J. Creighton testified that a check of the National Firearms Registration and Transfer Records revealed that this destructive device was not registered to James Purcell Oliver (Tr. 103-104).

Lillie Mae Jenkins continued to be threatened by James Oliver throughout the remainder of that summer. On several occasions subsequent to July 15th, James Purcell Oliver telephonically contacted Miss Jenkins in order to discourage her from testifying against him (Tr. 19). On more than one occasion, defendant Oliver

advised Miss Jenkins that he would "get her no matter what" if she testified against him (Tr. 20).

On August 12, 1974, James Oliver, in keeping with his threats, visited Miss Jenkins' place of employment and, in the presence of co-workers, assaulted her in an elevator (Tr. 20-22).

ARGUMENT

I.

The miscitation of a statute in Counts Two and Three of the Indictment was a totally innocuous typographical error, which in no way prejudiced the defendant, and which, under the circumstances of this case, does not warrant reversal of his conviction on those counts.

At disposition defendant Oliver argued that Counts Two and Three of the Indictment erroneously referred to Title 18, United States Code, Section 644(e). The government respectfully submits, and urges this Court to hold, that the argument lacks merit.

From the very earliest stages of this prosecution, the government made its file in this case available to the defense (Tr. 2). Additionally, the typographical error in Counts Two and Three of the Indictment was specifically called to the attention of defense counsel months before trial commenced (Tr. 3). The fact that Title 18, United States Code does not even contain a section 644 demonstrates that the error was truly typographical.

Counts Two and Three track precisely the critical language of Title 18, United States Code, Section 844(e) and contain a description of the telephonic threats made by

defendant on July 15th. In view of this, the government respectfully submits that both James Oliver, and the Federal Public Defender on his behalf, entered a valid "not guilty" plea to the substance, and the essence, of each count of the indictment. Cf. *United States v. D'Allesandro*, 517 F.2d 432, 434 (2d Cir. 1975) (Friendly, J.).

Rule 7(c)(3) of the Federal Rules of Criminal Procedure expressly provides that "[e]rror in the citation . . . shall not be ground for dismissal of the indictment . . . or for reversal of a conviction if the error . . . did not mislead the defendant to his prejudice." Also see, *United States v. Rivera*, 513 F.2d 519, 533 n. 21 (2d Cir. 1975) (Friendly, J.); cf. *United States v. Zolli*, 51 F.R.D. 522, 526 (E.D.N.Y. 1970).

On the basis of the foregoing, the government urges the Court to hold that defendant's attack upon the indictment is frivolous.

II.

There was ample evidence to sustain James Oliver's conviction on each count of the indictment.

Viewed in a light most favorable to the government, see e.g., *United States v. Glasser*, 315 U.S. 60, 80 (1942); *United States v. Johnson*, 513 F.2d 819, 821 (2d Cir. 1975); *United States v. Koss*, 506 F.2d 1103, 1106 (2d Cir. 1974), the evidence against James Purcell Oliver on each count of the indictment was overwhelming.

Despite vigorous cross-examination focusing on credibility (Tr. 23-24); eyesight (Tr. 24, 57); opportunity to make an eyewitness identification (Tr. 25-27, 61); lighting conditions (Tr. 28-29); distances (Tr. 29, 61); and emotional state (Tr. 42, 61), all government witnesses remained resolute and consistent in their testimony. The

defendant did not take the witness stand in his own defense. With the exception of a defense investigator, who testified as to distances he measured (Tr. 128-132), there were no defense witnesses.

The government respectfully submits that the jury was entitled to believe the prosecution's witnesses.

CONCLUSION

For all of the foregoing reasons, it is submitted that defendant's conviction should be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney
for the District of Connecticut
141 Church Street
New Haven, Connecticut 06510

THOMAS P. SMITH
Assistant United States Attorney
for the District of Connecticut

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 75-1339

UNITED STATES OF AMERICA
Appellee

v.

JAMES PURCELL OLIVER
Appellant

AFFIDAVIT OF SERVICE BY MAIL

Stephen Zedalis, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 194th Street
Flushing, N.Y.

That on the 20th day of November, 1975, deponent served the within Brief for the Appellee
upon Charles Sturtevant, Esq.
Federal Public Defender,
450 Main Street, Hartford, Connecticut 06103

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Stephen Zedalis

This 20th day of November 1975

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
N. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1978